IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5709 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

NAVIINCHADRA L MANDAVIA

Appearance:

MR SP HASURKAR for Petitioners

MRS DT SHAH for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 27/04/2000

ORAL JUDGEMENT

Learned A.G.P. Shri Gharania appearing on behalf of the petitioner and Learned Advocate Ms. D.T.Shah appearing on behalf of the respondent. In the present

petition rule made returnable by 26th August, 1996 and meanwhile the operation of the impugned order shall remain stayed subject to the provision of Section 17 (B) of the Industrial Disputes Act by order dated 2nd August, 1996. The respondent has filed a reply affidavit against the petition and alongwith the reply, the evidence of respondent workman and witness of petitioner and statement of workman has been produced on record. In the present petition, the award passed by the Labour Court, Bhavnagar in reference No. 183 of 1993 old No. 209 of 1990 dated 27th February, 1996 is challenged wherein, the Labour Court, Bhavnagar has granted reinstatement of respondent workman with continuity of service with 70% back wages of interim period.

The brief facts of the present petition is that respondent was working as a driver with the petitioner more than one year continuously and his service was terminated on 13th August, 1989 by the petitioner. The said termination order has been challenged by the respondent before the Labour Court, Bhavnagar in present reference. The statement of claim was filed by the respondent workman and reinstatement was filed by the respondent. Thereafter, the petitioner has produced some documents relating to the muster role and presence register and log book vide Ex. 6, 9, 25 and 26. Before the Labour Court, respondent workman was examined vide Ex.8 and witness of petitioner was examined vide Ex.13. Thereafter, the Labour Court has considered the oral and documentary evidence which are on record. The Labour Court has come to the conclusion that respondent had worked as per documentary evidence produced by the petitioner from 9th September, 1988 to 31 August, 1989 and completed 187 days continuous service thereafter, the Labour Court has examined that petitioner has not produced the muster role for the period 8th October, 1988 to 30th October, 1988 and 29th January, 1989 to 27th February, 1989. Therefore, so far the above documents which were not produced by the petitioner. The Labour Court had relied upon the oral evidence of witness of the petitioner that during this period from 8th October, 1988 to 30th October, 1988 and 29th January, 1989 to 27th February, 1989. The respondent was remain in service and actually he had worked with petitioner which covered 53 days working of respondent workman and if, said period is included in earlier working days 187 days continuous service and considering the facts during this period from 9th September, 1988 to 31st August, 1989 in all. 52 are Sundays and other public holidays, if included then workman concerned has completed 240 days continuous service, during this period from 9th September, 1988 to

31st August, 1989 which found to be proved by the Labour Court. The Labour Court has included the 52 Sundays and other public holidays in calculating 240 days continuous service relying upon the decision of Apex Court in case of Workmen of American Express International Banking Corporation v. Management of American Express International Banking Corporation reported in A.I.R. 1986 S.C. page-458. The relevant observation of the above referred case of the Apex Court are as under :

"The qualification for relief under S. 25-F is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in S. 25-B of the Act. In view of sub-s. (2) of S. 25-B the workman shall be deemed to be in continuous service if he has "actually worked under the employer" for particular period. The expression "actually worked under the employer" cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc. Thus, Sundays and other paid holidays should be taken into account for the purpose of reckoning the total number of days on which the workman could be said to have actually worked. AIR 1981 SC 852, Disting."

Thereafter, the Labour Court has examined the question that whether the petitioner has followed the legal procedure as a condition precedent under Section 25-F of the Industrial Disputes Act or not ? The clear finding given by the Labour Court in paragraph 11 in come to the conclusion that petitioner has not complied the provisions of Section 25-F of Industrial Disputes Act and therefore, come to the conclusion that respondent is entitled the reinstatement in service. This is a pure finding of fact based upon evidence which does not required any interference by this Court.

Thereafter, the Labour Court has further examined the question of back wages of interim period. The respondent workman has given his evidence vide Ex.8 wherein, he deposed before the Labour Court that after the termination he remain unemployed and inspite of having efforts made by the respondent but, respondent was

not able to obtain any gainful employment during the interim period. The petitioner has not proved any gainful employment of respondent workman. But however, the Labour Court has considered the fact of shortage of driver in the society. Therefore, the Labour Court has presumed that respondent workman is working as a driver and he having the heavy licence. Therefore, considering the fact that driver normally can not remain without work and on that presumption the Labour Court has reduced back wages 30% and granted 70% of interim period to the respondent workman by order dated 27th February, 1996.

The Learned A.G.P. Mr. Gharania has submitted that respondent was in service about less than one year and petitioner is a Government Body and in such circumstances merely a legal procedure under Section 25-F was not followed and respondent workman was working on ad-hoc temporary basis who was not a regular employee.

Therefore, the back wages in such circumstances should not have to be granted which saddled with liability of back wages. Considering the said submissions of Learned A.G.P. the recently the Apex Court has considered in case of Management of M.C.D. v Prem Chand Gupta and another reported in A.I.R. 2000 page-454. The relevant observation in such cases in respect to Section 25-F and for the claim of back wages has been considered by the Apex Court. The relevant observation in paragraph 16, 17 and 19 are as under :

"16. To recapitulate, it is a well established fact on the record of this case that the respondent-workman though initially appointed for one year from 5-5-1964 on a temporary post of Section Officer (Civil) was continued in service after expiry of that year. His very appointment order of 5-5-1964 mentioned that he could be considered for confirmation after one year of satisfactory service. Even though he was never confirmed, the appellant-Corporation did not terminate his services but continued him in service. Not only that, but on 1-10-1964 after giving a short break in service and he was re-appointed against a vacant post caused by termination of service of another employee. Thus, at least from 1-10-1964 even though in temporary service, he continued to work on a vacant permanent post of Section Officer (Civil) and continued to serve as such for further 18 months up to 29-4-1966 when he was visited with the impugned termination order. By that time he

had completed not less than 240 days of continuous service for one calendar year immediately preceding 29-4-1966 i.e. from 1-4-1965 to 29-4-1966. Consequently, Section 25-F of the I.D.Act, 1947 got squarely attracted in his case. It reads as follows :

"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer untill-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice.

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government (or such authority as may be specified by appropriate Government by notification in the Official Gazette.)"

It is not in dispute between the parties that these requirements were not complied with by the appellant-Corporation while terminating the respondent-workman's service. The Labour Court rightly held accordingly. However, having so held on facts, the Labour Court found that Section 25-F would not apply for the reason that the respondent-workman's services were not terminated because of his being an excess staff. The said reasoning of the Labour Court ran parallel to the earlier decisions of this Court which had taken such a view on interpretation of Section 25-F. But the said line of reasoning no longer held the field in the light of the later decisions of this Court. In the case of The State Bank of India v. Shri N. Sundara Money(1976) 1 SCC 822 :(AIR 1976 SC 1111 : 1976 Lab IC 769), a three Judge Bench of this Court interpreting Section 25-F read with Section 2(oo) of the I.D.Act, speaking through Krishna Iyer, J.

in para 9 of the report clearly laid down that in Section 2(oo) the word 'termination' for any reason whatsoever is the key word. Whatever the reason every termination spells retrenchment. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. The said decision of the three Judge bench was approved by a Constitution Bench of this Court in the case of Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh (1990)3 SCC 682. In view of this settled legal position, therefore, it must be held that termination of services of the respondent-workman on 29-4-1966 which was admittedly not by way of punishment clearly amounted to retrenchment attracting Section 25-F of the I.D.Act."

"As a result of the aforesaid discussion, it must be held that termination of the respondent-workman's service on 29-4-1966 was violative of Section 25-F of the I.D.Act and was, therefore, null and void. The second point for determination is answered in affirmative against the appellant-Corporation and in favour of the respo9ndent-workman, subject to our decision about appropriate relief to be given to the respondent-workman as will be indicated while considering the last point for determination."

"19. The reasons for non-granting full back-wages from the date of his termination of 29-4-1966 till actual re-instatement pursuant to the present order can now be indicated. Firstly, for no fault of the contesting parties, the litigation has lingered on for more than three decades. The termination order was as early as on 29-4-1966 and after 33 years and more it is being set aside. To saddle the appellant-Corporation and its exchequer, which is meant for public benefit, with full back-wages for entire period would be too harsh to the appellant-Corporation. It is the delay in disposal of cases in the Courts that has created this unfortunate situation for both the sides. Respondent-workman is also not at fault as he was clamouring for justice for all these years. However, this delay in Court proceedings for no fault of either side permits us not to burden the

appellant-Corporation, being a public body, with the full back-wages for the entire period of respondent-workman's unemployment, especially when for no fault of either side actual work could not be taken from the respondent-workman by the appellant-Corporation. It is true that the respondent-workman was always willing to work but he could not be permitted to work so long as the termination order stood against him. The Labour Court as well as the learned single Judge upheld that order. Only the Division Bench set aside that order. this Court at SLP stage itself while granting leave stayed reinstatement order on 17-11-1997. Two more years since elapsed during the pendency of this appeal before this Court. All these factors together point in the direction of not saddling the appellant-Corporation, a public body, with the burden of entire full back-wages to be granted to the respondent-workman after the passage of 33 years since his order of termination. The second reason is that the respondent-workman for all these years could not have remained totally unemployed though there is no clear evidence that he was gainfully employed and was so well off that he should be denied complete back-wages. But keeping in view the fact that for all these long years fortunately the respondent-workman had survived and has still two more years to reach the age of superannuation as we are told, not granting him full back-wages on the peculiar facts of this case, would meet the ends of justice. We, therefore, following order :

1. The impugned order of the Division Bench of the High Court insofar as it holds that the termination order of the respondent-workman dated 29-4-1966 was violative of Rule 5 of the relevant Rules is set aside.

2. However, the final order passed by the High Court ordering reinstatement of the respondent-workman with continuity of service is upheld on the alternative ground holding termination of services of the respondent-workman on 29-4-1966 to be violative of Section 25-F of the I.D.Act.

3. So far as back-wages are concerned, the impugned order of the High Court is modified by directing that the respondent-workman will be

entitled to get 50% of back-wages from the date of his termination i.e. from 29-4-1966 till his actual re-instatement in service of the appellant-Corporation with continuity of service. The respondent-workman will also be entitled to all other consequential benefits including increments in the available time scale and revisions of the time scale, if any, and also further service benefits as per the rules and regulations of the appellant-Corporation being treated to have been in continuous service of the appellant-Corporation from 29-4-1966 all through out till re-instatement. The appellant-Corporation shall reinstate the respondent-workman with continuity of service within 8 weeks from today and will also pay 50% back-wages as directed hereinabove within that period. The appellant-Corporation will also grant all other consequential benefits to the respondent-workman in the light of this judgment. Appeal stands allowed as aforesaid with no order as to costs in the facts and circumstances of the case."

In view of the observations made by the Apex Court though the case before the Apex Court though workman was entitled full back wages of interim period but, the Apex Court has reduced 50% back wages. Similarly, in present case also the respondent workman has remained in service about one year, termination was dated 31st August, 1989, reference pending about six years before the Labour Court and thereafter, four years the petition is pending in this Court. 25-F has not been followed. Respondent workman was working as a driver and petitioner is a State Authority and therefore, considering all facts and circumstances, according to my opinion, if award relating to 70% back wages if it is reduce to 50% back wages which will meet the end of justice. In peculiar facts of present case, accordingly the award passed by the Labour Court, Bhavnagar in reference No. 183 of 1993 old No. 209 of 1990 dated 27th February, 1996 has been modified as under :

"The petitioner is directed to reinstate the respondent workman with continuity of service with 50% back wages of interim period from the date of termination 13th August, 1989 till the date of award dated 27th February, 1996."

In view of these the present petition is partly allowed. Rule made absolute to that extent wherein, I am confirming the reinstatement of the respondent workman with 50% back wages of interim period. Therefore, I am directing to the petitioner that if so far respondent is not reinstated in service then petitioner shall have to reinstate the respondent workman in service within a period of four weeks from the date of receiving the certified copy of the said order. It is also directed to the petitioner to pay 50% back wages which revise time to time for the interim period from 13th August, 1989 to 27th February, 1996 to the respondent workman within a period of six weeks from the date of receiving certified copy of the said order and it is further directed to the petitioner to pay full wages to the respondent workman from 27th February, 1996 to the actual date of reinstatement subject to adjustment of any payment either under Section 17(B) or wages which has been paid by the petitioner to the respondent within a period of eight weeks from the date of receiving the certified copy of the said order.

In view of the above observation and direction the present petition is partly allowed and rule made absolute to that extent. No order as to costs.

Date : 27-04-2000. (H.K.RATHOD,J.)

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